OCTOBER TERM, 1993

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 93-6431

JOHN EARL BUSH,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

(I)

a) Whether the conflicts between the Eleventh Circuit's approach and this Court's standards in Enmund v. Florida, Cabana v. Bullock and Tison v. Arizona warrant this Court's review.

b) Is a state court "sufficiency" ruling -- that a defendant's "participation" with his codefendants can be substituted for a finding on the defendant's mental state -- enough to satisfy Enmund v. Florida, Cabana v. Bullock, Tison v. Arizona and the eighth amendment?

c) Should Tison and Bullock still be construed to require express state court findings on the defendant's mental state or should the Eleventh Circuit's approach be deemed sufficient?

d) Can a death sentence be sustained under the eighth amendment when the state courts have not expressly found that the defendant intended to kill or was recklessly indifferent to human life but, rather, when the state supreme court has found that the "only known version of the events" is that the defendant did not intend to kill?

(II)

a) Whether the standard fashioned by the Eleventh Circuit -- that a petitioner must point out actual "evidence" of confusion in a jury's deliberations to support a claim that capital sentencing instructions were inaccurate and misleading -- is sustainable under this Court's law and the eighth amendment.

b) Whether the standard applied by the Eleventh Circuit to address Petitioner's claim that his capital sentencing jury was inaccurately instructed is in conflict with this Court's precedent in cases such as Caldwell v. Mississippi, Mills v. Maryland, McKoy v. North Carolina and Beck v. Alabama.

c) Whether the instructions afforded Petitioner's jury as to its vote at capital sentencing were misleading and inaccurate and whether they violated the eighth amendment.

(III)

a) Whether the conflicts between the standard employed by the Eleventh Circuit to evaluate claims of ineffective assistance of counsel in Petitioner's case and other cases and the standards established by this Court in Strickland v. Washington warrant the granting of certiorari review.

b) Whether an attorney's asserted "tactic," no matter how uninformed, uninvestigated, or unreasonable insulates that attorney against a claim of ineffective assistance of counsel at capital sentencing.

c) Whether the actions of an attorney who fails to investigate for capital sentencing and testifies that he had no tactical reason for failing to investigate can nevertheless be construed to amount to a "reasonable" strategy under Strickland v. Washington.

d) Whether the Eleventh Circuit's cursory, two-sentence summary ruling on the issue of prejudice comports with the standards established by this Court in Strickland v. Washington.

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OCTOBER TERM, 1993

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 93-431

JOHN EARL BUSH,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, John Earl Bush, through counsel, prays that the Court issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993).

The Court of Appeals allowed Mr. Bush's death sentence to stand by a vote of 2-1. See Bush, 988 F.2d at 1093-97 (Kravitch, J., dissenting); see also id. at 1082 (majority opinion). Mr. Bush timely sought panel rehearing and en banc review. The petition was denied. On August 9, 1993, the Court of Appeals stayed its mandate in order to afford Petitioner the opportunity to seek certiorari

review in this Court. The Court's stay of mandate was predicated upon Fed. R. App. P. 41 and its counterpart, 11th Cir. Rule 41-1, which state in relevant part that "[o]rdinarily [a request for stay of mandate pending certiorari review] will be denied ... unless a substantial question is to be presented to the Supreme Court ...." The substantial nature of the questions involved; the conflicts engendered by the Court of Appeals' majority opinion, an opinion which will affect future cases in that Court; and the need for resolution by this Court are discussed in the body of this petition.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals upheld Petitioner's death sentence by a 2-1 vote. The opinion is reported as Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993). Judge Kravitch's dissent is reported at Bush, 988 F.2d at 1093-97. The opinion is included in the Appendix to this petition at Att. A.

Petitioner sought rehearing and en banc review. The discussion provided to the Court of Appeals by that petition is excerpted in the Appendix at Att. B. The summary order of the Court of Appeals denying the petition (July 20, 1993) is included in the Appendix at Att. C. The order of the Court of Appeals staying issuance of the mandate pending certiorari review in this Court was issued on August 9, 1993, and is included in the Appendix to this Petition at Att. D.

The opinion of the Supreme Court of Florida on direct appeal of the proceedings resulting in Petitioner's death sentence,

discussed in the text of this petition, is reported as Bush v. State, 461 So. 2d 936 (Fla. 1985), and is included in the Appendix at Att. E. The Florida Supreme Court's opinions on state court post-conviction review (state habeas corpus and Fla. R. Crim. P. 3.850) are reported as Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987), and Bush v. Dugger, 579 So. 2d 725 (Fla. 1991), and are included in the Appendix at Att. F and Att. G. The Order of the United States District Court for the Middle District of Florida is not reported. It is included in the Appendix at Att. H.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was issued on March 20, 1993. Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993) (Att. A). Petitioner timely filed for rehearing and en banc review (Att. B). The Court of Appeals denied rehearing and en banc review on July 20, 1993 (Att. C). On August 9, 1993, the Court of Appeals stayed its mandate in order to afford Petitioner the opportunity to seek certiorari review in this Court. The Court stayed the mandate to and including October 18, 1993, pending the filing of this certiorari petition and thereafter pending this Court's ruling (Att. D). The filing of this petition is timely under this Court's rules and is within the time period set by the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States of America provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right(s) to a ... trial, by an impartial jury ... and to have the assistance of counsel ....

The Eighth Amendment to the Constitution of the United States of America provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States of America provides in relevant part:

> No state shall ... deprive a person of life, liberty, or property without due process of law.

Fla. Stat. section 921.141 (Florida's capital sentencing statute) sets forth Florida's capital sentencing scheme and is also relevant to the questions presented by this petition.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Four tape recorded statements obtained by law enforcement officers from Mr. Bush were played during the trial. These statements "constitute the only known version of the events ...." Bush v. State, 461 So. 2d 936, 937 (Fla. 1985). The statements were

> to the effect that [Mr. Bush] did not realize that his accomplices, Alfonso Cave, "Pig" Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination. Bush states that after the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not

> desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially. Slater fell to the ground and an accomplice, Parker, shot her.

Bush v. State, 461 So. 2d at 938. The testimony of the medical examiner, Dr. Wright, confirmed that the knife wound was superficial (ROA 465) and that Ms. Slater died as a result of a gunshot wound (ROA 471).[1]

After being instructed on felony-murder and accomplice liability theories, the jury convicted. Defense counsel knew that the sentencing judge intended to impose the death penalty. Defense counsel, however, had developed no evidence in mitigation and presented none at sentencing. Defense counsel "failed to conduct even a minimally adequate search into Bush's background," Bush v. Singletary, 988 F.2d 1082, 1094 (11th Cir. 1993) (Kravitch, J., dissenting); "did not conduct a constitutionally adequate investigation into Bush's background and [consequently] did not introduce significant evidence that could not reasonably have given rise to damaging rebuttal," id. at 1096; "had every chance to develop mental health mitigation but neglected to do so," id. at 1095; "was inexcusably unaware of information that would have explained [Mr. Bush's record]," id. at 1095; and "abdicat[ed] ... his responsibility to investigate and present mitigating evidence ... in a way sufficiently egregious to implicate Bush's right to constitutionally effective counsel." Id. at 1096. As Judge Kravitch outlined:

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[1] "ROA" refers to the state court record on direct appeal filed in the Florida Supreme Court and thereafter in the United States District Court and Eleventh Circuit Court of Appeals.

> At the evidentiary hearing in the district court, Muschott [trial defense counsel] conceded that he prepared no mitigating evidence whatsoever to present at sentencing. Dist.Ct.Tr. at 402. He never looked into Bush's psychological history. He never sought Bush's school or prison records. Id. at 319. He never developed evidence of the hardships of Bush's abusive and tragic life growing up in a family of seasonal farmworkers. Id. at 321. He never developed any evidence that might have explained or softened the effect on the jury of Bush's 1974 conviction. Id. at 344. These items were not hidden facts, discoverable only through substantial effort. They were basic background facts and records which the most cursory investigation and preparation would have revealed. And, significantly, Muschott admitted that he did not have a reasonable, tactical reason for not seeking or developing much of this evidence. See, e.g., id. at 319. He simply did not do it.

Bush v. Singletary, 988 F.2d at 1094 (Kravitch, J., dissenting) (footnote omitted) (emphasis supplied).

Under Florida's law, a jury's verdict for death need not be unanimous, but can be made by a simple majority. If a majority does not vote for death, the verdict must be life -- thus, if the jury's vote is six to six, the recommendation is one for life, and the defendant has the right to that verdict. The jury's verdict carries "great weight" and can be overridden only in limited circumstances. Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 2928-29 (1992).

Notwithstanding these standards, the prosecutor repeatedly informed Petitioner's jurors that their verdict for death or life "has to be by a majority of you" and that "[i]t requires seven or more for any advisory sentence" (ROA 45) (emphasis supplied). The judge's instructions then provided the jurors with four comments

about the jury vote, three of which instructed the jury to follow the prosecutor's improper and misleading construction:

> - First: "Your decision may be made by a majority of the jury" (ROA 1290).
>
> - Second: "The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily..." (ROA 1290).

After these two instructions, the judge's third, inconsistent, comment was: "if by six or more votes the jury determines that John Earl Bush should not be sentenced to death," the life recommendation option could come into play (ROA 1290).

Immediately after this statement, the judge provided the jury with his final instruction. This fourth instruction, the last instruction the jury heard before it retired, told the jury:

> You will in just a moment retire to consider your verdict. When seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to this court.

(ROA 1291) (emphasis supplied). "[T]he jury recommended, in a 7-5 advisory sentence, that the death penalty be imposed. The trial judge, citing three aggravating factors and no mitigating factors, sentenced Bush to death." Bush v. State, 461 So. 2d 936, 938 (Fla. 1985).

The convictions and death sentence were affirmed on direct appeal, Bush v. State, 461 So. 2d 936 (Fla. 1985) (Att. E), notwithstanding the Florida Supreme Court's findings that "the only known version of the events" established by the record showed that Mr. Bush "did not realize" what the other participants' plans were;

that he "was under their domination"; that "he intended to set [the decedent] free"; that he did not "desir[e] to kill the victim"; and that he did not kill her. Id. at 937-38.

As to the inaccurate verdict instructions provided to the jury, the Florida Supreme Court noted that "the jury charge contained some objectionable comments..." Bush, 461 So. 2d at 941. Nevertheless, the Florida Supreme Court, like the Court of Appeals in its subsequent ruling, relied on the third comment to deny relief. As in the Court of Appeals' subsequent decision, the Florida Supreme Court provided no analysis to support its conclusion that the instructions were not misleading which accounted for the facts that three of the four instructions provided were inaccurate; that the prosecutor urged the jury to follow the inaccurate construction; or that the final instruction the jury heard from the judge emphasized the inaccurate construction.

Post-conviction relief was thereafter denied by the state courts. Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987); Bush v. Dugger, 579 So. 2d 725 (Fla. 1991). Mr. Bush filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The District Court conducted an evidentiary hearing limited to the claim of ineffective assistance of counsel at sentencing. Notwithstanding the evidence heard at the hearing, see Att. A, Bush v. Singletary, 988 F.2d at 1093-97 (Kravitch, J., dissenting) (outlining the evidence), the District Court denied relief. Att. H (District Court Order).

The Court of Appeals, by a 2-1 vote, thereafter allowed the death sentence to stand. Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993) (Att. A). That opinion is the subject of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

(I)

THE CONFLICTS BETWEEN THE ELEVENTH CIRCUIT'S RULING AND ENMUND V. FLORIDA, CABANA V. BULLOCK, TISON V. ARIZONA, AND THE EIGHTH AMENDMENT

A. This Court's Standards And Their Application To This Case

John Bush's statements "constitute the only known version of the events," Bush v. State, 461 So. 2d 936, 937 (Fla. 1985), and were "to the effect that he did not realize that his accomplices, Alfonso Cave, 'Pig' Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination." Id. at 937-38. "[A]fter the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially." Bush, 461 So. 2d at 938. "[A]n accomplice, Parker, shot her." Id. The medical examiner confirmed that the stab wound was superficial and could not have caused death, and that Ms. Slater died as a result of the gunshot wound (R. 465, 471).

The eighth amendment does not permit "imposition of the death penalty on one ... who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund v. Florida, 458 U.S. 782, 797 (1982). Under Enmund, "[t]he focus must be on [the defendant's] culpability, not on that of [the accomplice] who ... shot the [victim], for we insist on 'individualized consideration as a constitutional requirement in imposing the death penalty...'" Enmund, 458 U.S. at 798, relying on Lockett v. Ohio, 438 U.S. 586, 605 (1978), and Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgement upholding the death penalty....

Enmund, 458 U.S. at 801.

As in Enmund, so too in this case the Florida courts affirmed the death penalty in the absence of record proof that Mr. Bush "killed or attempted to kill, and regardless of whether he intended or contemplated that life would be taken." Enmund, 458 U.S. at 801. Such a finding would have contradicted the very facts cited by the Florida Supreme Court in its recitation concerning what this record disclosed.

In Cabana v. Bullock, 474 U.S. 376 (1986), this Court further explained that the mental state finding required by Enmund must be made by the state courts. Bullock also cautioned that federal

reviewing courts were not to rely on or deem sufficient state court findings that the defendant a) was an active or major participant, and/or b) that there was "sufficient" evidence in the record from which a finding as to the defendant's culpability could be made. Cabana v. Bullock, 474 U.S. at 389-90. Enmund v. Florida, Cabana v. Bullock, and Tison v. Arizona (discussed below) require a finding of fact from the state courts as to the defendant's individual mental state, not a sufficiency determination -- i.e., not, as here, a ruling that participation can be deemed sufficient to constitute the intent required by Enmund.

Thus, the Mississippi Supreme Court's express holdings that "[t]he evidence is overwhelming that [Bullock] was present, aiding and assisting in the assault upon, and slaying of [the decedent]," and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon [the decedent]," Cabana v. Bullock, 474 U.S. at 389 (emphasis added), quoting Bullock v. State, 391 So. 2d 601, 606, 614 (Miss. 1980), were deemed insufficient to establish the requisite findings of fact on the defendant's mental state because they constituted only a finding of major participation. Such a sufficiency determination that there was evidence from which a finding of intent could be made, i.e., that the defendant's participation and actions constituted intent, was deemed tantamount to a finding that "by legal definition [Bullock] actually killed." Cabana v. Bullock, 474 U.S. at 389-90.

> Such a finding does not satisfy Enmund, for Enmund holds that the Eighth Amendment does more than require that a death-sentenced defendant be legally responsible for a killing as a matter of state law; it requires that he himself actually killed, attempted to kill, or intended that lethal force be used.

Cabana v. Bullock, 474 U.S at 390.

In Mr. Bush's case, as discussed below, the requisite finding as to his individual mental state was not made by the jury or judge at sentencing, nor by the Florida Supreme Court on direct appeal. The jury heard arguments and instructions on felony murder. The jury convicted and recommended death by a vote of 7-5. No interrogatories as to the jury's findings at trial or sentencing were returned. The sentencing judge and Florida Supreme Court then undertook the same analysis as that of the Mississippi courts in Bullock and of the state courts in Tison (discussed below). The ruling was that because of his participation, Petitioner contributed to the victim's death. Bush v. State, 461 So. 2d 936, 941 (Fla. 1985). Like the Mississippi Supreme Court in Bullock, the Florida Supreme Court made a "sufficiency" determination: that Mr. Bush's "involvement" satisfied "the intent or contemplation required by Enmund." See Bush, 461 So. 2d at 941. But see Bush, 461 So. 2d at 938 ("Bush avers that he intended to get her free. However, the accomplices decided [that she should be killed]. Bush, not desiring to kill the victim, faked a blow at her ... [A]n accomplice, Parker, shot her"). The Florida Supreme Court did not discuss how a finding of fact that Mr. Bush killed, intended to kill, or attempted to kill could be supported on this record. And the Florida Supreme Court made no such finding. Indeed, such a finding would have been at odds with the statement of the facts

related by the Florida Supreme Court itself in the earlier portions of its opinion.

Cabana v. Bullock holds that findings of major or active participation, rulings that because of his participation and actions the defendant contributed to the decedent's death, and/or sufficiency determinations that the defendant's involvement should be equated to intent, do not constitute the finding of fact on the defendant's mental state required by the eighth amendment. There is little difference between the ruling of the Mississippi courts in Bullock and that of the Florida courts here.

In Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676 (1987), this Court reiterated that a finding of major or active participation and contribution to the victim's death does not constitute the requisite finding of individual culpability. Tison, 107 S. Ct. at 1688. Tison held that the state courts must also make a finding of intent or, at a minimum, "reckless indifference to human life" before the death penalty can satisfy the Enmund culpability requirement. Because the state courts had found major participation, see Tison, 107 S. Ct. at 1688, ("The petitioner's own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial'"), but not "intent" or "reckless indifference to human life," this Court, relying on Cabana v. Bullock, held:

> The Arizona courts have clearly found that the former [major or active participation] exists; we now vacate the judgments below and remand for determination of the latter [intent or reckless indifference to human life] in further proceedings not inconsistent with this opinion.

Tison v. Arizona, 107 S. Ct. at 1688. In Tison, the state courts had found that the defendants were major, active participants whose "own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial'." Tison v. Arizona, 107 S. Ct. 1676, 1688 (1987). These findings went beyond those found in Mr. Bush's case. Under the eighth amendment, however, the findings were not enough.

Briefly stated, the Tison brothers gathered a small arsenal of weapons in order to "break" their father and another out of prison. While on the run the four kidnapped a family, then drove them to the desert where the elder Tison shot and killed the family. The Arizona Supreme Court, relying on Enmund, sustained the death sentences, finding:

a) That the Tison brothers "could anticipate the use of lethal force during this attempt to flee confinement." State v. (Rickey) Tison, 690 P.2d 747, 749 (Ariz. 1984);

b) That the Tison brothers abducted the victims, had armed themselves, forced the victims into the car, and escorted the victims to the murder site. They were there when the victim begged "Jesus, don't kill me;" heard the shooter say he was "thinking about it;" and saw the shooter "brutally murder the four captives with repeated blasts from their shotguns." Tison, 107 S.Ct. at 1679; Tison, 690 P.2d at 749;

c) The Tison brothers did not withdraw, did not make "an effort to help the victims," Tison, 107 S.Ct. at 1679, and, "[a]fter the killings, [they] did nothing to disassociate [from the

co-defendant's actions], but instead used the victims' car to continue on the joint venture..." Tison, 690 P.2d at 749; and,

d) The Tison brothers "intended to kill" because their "participation up to the moment of the firing of the fatal shots was substantially the same as [that of the shooter];" they "did nothing to interfere with the murders, and after the murders even continued on the joint venture." Id.

The trial judge found that the Tisons' participation was not relatively minor, that the "participation of each [petitioner] in the crimes" was "very substantial," and that each participant "could reasonably have foreseen that his conduct ... would cause or create a grave risk of ... death." Tison v. Arizona, 107 S. Ct. at 1680. The Arizona Supreme Court also found that "[t]he deaths would not have occurred but for their assistance." State v. (Rickey) Tison, 633 P.2d 335, 354 (Ariz. 1981); Tison v. Arizona, 107 S. Ct. at 1680.

> In the present case ... the evidence does demonstrate beyond a reasonable doubt ... that petitioner intended to kill .... [P]etitioner could anticipate the use of lethal force ... in fact, he later said that during the escape he would have been willing personally to kill in a 'very close life or death situation,' and that he recognized that after the escape there was a possibility of killings.
>
> ... Petitioner played an active part in the events that led to the murders ... [relating the facts listed as "a, b, c, and d" above] ....
>
> ... From these facts we conclude that petitioner intended to kill. Petitioner's participation up to the moment of the firing of the fatal shots was substantially the same as that of [the triggerman] .... Petitioner actively participated in the events leading to death ...

> In Enmund, unlike in the present case, the defendant did not actively participate in the events leading to death (by, for example, as in the present case, helping abduct the victims) and was not present at the murder site.

Tison v. Arizona, 107 S. Ct. at 1681 (emphasis added), quoting State v. (Raymond) Tison, 690 P.2d 755, 757-58 (Ariz. 1984). The Arizona Supreme Court thus found "the dictate of Enmund is satisfied." Id.

Unlike the state courts in Tison, the state courts in Mr. Bush's case expressly noted that the "only known version of the events" was that Mr. Bush did not intend to kill the decedent, intended to set her free, and that "not desiring to kill the victim" he faked a superficial blow at her. Bush, 461 So. 2d at 938. The state courts in Mr. Bush's case also expressly found that "an accomplice ... shot her." Id.

But like the state courts in Tison, the state courts in Mr. Bush's case ruled that the requirement of Enmund was satisfied because Mr. Bush was "an active participant in the convenience store robbery" whose participation contributed to the victim's death and who was not a "passive aider and abettor as in Enmund, where the only participation by Enmund was as driver of the getaway car." Bush, 461 So. 2d at 941. Significantly, unlike the state courts in Tison, the state courts in Mr. Bush's case never stated that he intended to kill, nor that he anticipated lethal force would be used, nor that his participation and intent were the same as that of the shooter. Like the state courts had done in Tison, the state courts here relied on Mr. Bush's participation and

involvement in the felonies to support a ruling that Enmund was met. And as in Bullock and Tison, Mr. Bush's involvement was used to supplant a finding of intent; a specific finding of intent or reckless indifference was not made. See e.g., Bush, 461 So. 2d at 941. The sufficiency ruling here, as in Tison, was that "[t]he degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by Enmund". Bush, 461 So. 2d at 941.

There is no legitimate basis upon which it can be said that the Tisons were entitled to relief but Mr. Bush is not. It is simply not possible to meaningfully distinguish Tison from this case. In Tison, this Court reiterated that "[a]rmed robbery is a serious offense, but one for which the death penalty is clearly excessive ...." Tison, 107 S.Ct. at 1683. Underlining its Enmund language, this Court wrote that "the focus [has to] be on his culpability, not on that of those who ... shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id. Thus the Court in Tison rejected imposition of death upon state court findings which went beyond the ones made in Mr. Bush's case:

> Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force ... might be used ... in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself.

Tison, 107 S.Ct. at 1684. Here, as in Tison, "major participation" and contribution to the death because of that participation is the only thing found. The Florida Supreme Court's analysis in Mr. Bush's case fails under Tison.

After writing that Mr. Bush was "a major, active participant in the convenience store robbery" whose actions contributed to the crime, the Florida Supreme Court added but one other sentence to its determination of the Enmund issue:

> The degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by Enmund.

Bush, 461 So. 2d at 941 (emphasis added). This "sufficiency" determination is certainly not an Enmund finding of fact.

First, as discussed above, this ruling was based on an analysis akin to that of the state courts in Tison -- that participation/involvement in felonies that is not relatively minor, or not as minor as that in Enmund, cf. Bush, 461 So. 2d at 941 ("Here, we do not have" a passive abettor "as in Enmund"), could be substituted for the requisite mental state finding of fact as to individual intent or culpability.

Second, this Court made it clear in Cabana v. Bullock that state court "sufficiency" determinations are not enough to constitute an Enmund finding of fact. Such sufficiency determinations do not meet the Enmund requirement of individualized treatment. There is thus no true Enmund finding in the Florida Supreme Court's sufficiency assertion that Mr. Bush's participation

was "sufficient" "to support a finding" that his "involvement" could constitute "intent" or "contemplation" under Enmund.

In Bullock, this Court held that a finding satisfying the Enmund requirement that a death-sentenced defendant "have actually killed, attempted to kill, or intended that lethal force be used" must be made by the state courts, Bullock, 474 U.S. at 390-91, and expressly held that a sufficiency determination is not such a finding. The Bullock court explained that the Mississippi Supreme Court's rulings that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, [the victim]," and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon [the victim]," 474 U.S. at 389 (emphasis added), "represent[ed] at most a finding that ... [the defendant] by legal definition actually killed." Bullock, 474 U.S. at 390 (citations omitted) (emphasis in original). See also Tison v. Arizona, 107 S. Ct. at 1688 (applying this analysis).

As did the state court findings in Tison, the Mississippi Supreme Court's findings in Bullock went quite beyond what the Florida Supreme Court wrote in Mr. Bush's case. However, even the Mississippi Supreme Court's language was not enough "to constitute a finding that Bullock killed, attempted to kill, or intended to kill ..." Bullock, 474 U.S. at 389. Simply put, a state-court sufficiency determination is not an Enmund finding of fact. Bullock, 474 U.S. at 389-91. And a state court sufficiency determination such as the one here -- that because of participation

that is not minor intent could be found and Enmund should be deemed to be satisfied -- meets neither Bullock nor Tison. A sufficiency determination, however, is all that the trial judge's comments and Florida Supreme Court's opinion reflect in this case.

The record, the sentencing judge's comments, the Florida Supreme Court's opinion and the Eleventh Circuit's ruling are discussed below.

B. The "Only Known Version of the Events" -- John Bush's Statements

The State introduced four pretrial statements made by Mr. Bush. Three of these statements were made on May 4, 1982, one at 8:40 a.m., one at 7:35 p.m., and one at 9:20 p.m. (ROA 686, 749, 767). The fourth statement was made on May 7, 1982 (ROA 810). As presented at trial, the statements established the following:

On the evening of April 26, 1982, Mr. Bush, who was 19 years old at the time, met with Alfonso Cave, "Pig" Parker, and Terry Wayne Johnson in Fort Pierce, Florida. After a few drinks, they purchased a gallon of gin (ROA 768) and drank it. They also smoked marijuana. They drove toward Stuart, intending to go to Palm Beach (ROA 814). They reached Stuart at approximately 11:00 p.m. and drove out toward Indiantown (ROA 845). There, they stopped at a convenience store. Mr. Bush went in and bought a bag of potato chips. For the next several hours they rode around.

They changed their minds about going to Palm Beach and the group headed back towards Fort Pierce, stopping at the convenience store where Frances Slater worked (ROA 817). Mr. Bush went in to purchase cigarettes. Cave and Parker then got out of the car and

came up behind Mr. Bush as Frances Slater was coming from the back of the store. Cave pulled a gun on her (ROA 819). Cave and Parker told her to open the cash register and the floor safe (ROA 819). After Ms. Slater took the money bag out of the safe, Cave told Mr. Bush to take the bag, to get out and to go to the car. Mr. Bush followed Cave's command. When Mr. Bush got to the car, Cave came out of the store bringing Ms. Slater with him. Cave and Parker put Ms. Slater in the back seat of the car and told Mr. Bush to drive (ROA 819). Mr. Bush did not want to rob the store or kidnap Ms. Slater, but he followed Parker's and Cave's orders. They were armed. He was frightened -- "[h]is statements are to the effect that ... during and after the robbery he was under their domination." Bush, 461 So. 2d at 937-38.

Mr. Bush was told to drive south on U.S. 1. They then told him to head towards Indiantown (ROA 819). When the vehicle got further down the road, Cave and Parker ordered Mr. Bush to stop, (ROA 820); Bush, 461 So. 2d at 938 (they "ordered him to stop"), and Cave and Parker then pushed Ms. Slater out of the car.

Mr. Bush wanted to let her go (ROA 821). "[H]e intended to set her free." Bush, 461 So. 2d at 938. Cave and Parker, however, decided that she might be able to identify them; they told Mr. Bush to "get rid" of her. Parker offered his gun to Mr. Bush; Mr. Bush refused to touch it. Cave gave Mr. Bush his knife (ROA 822), telling him to take it.

Mr. Bush, not wanting to kill Ms. Slater, see Bush, 461 So. 2d at 938 ("not desiring to kill the victim"), and frightened, "faked

a blow at her with the knife and stabbed her superficially." Bush, 461 So. 2d at 938. (The superficial nature of the wound was confirmed by the trial testimony of the medical examiner.) Ms. Slater fell to the ground (ROA 820). Mr. Bush then turned to get back to the car. However, Parker also had gotten out of the car. As Mr. Bush was getting into the car, he heard a gunshot. "An accomplice, Parker, shot her." Bush, 461 So. 2d at 938.

Mr. Bush turned to see Parker standing over Ms. Slater with the gun in his hand. This was the fatal gunshot wound (ROA 837). Mr. Bush, frightened, drove the car away.

As the Florida Supreme Court summarized, his statements, "the only known version of the events," are "to the effect that he did not realize that his accomplices, Alfonso Cave, 'Pig' Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination." Bush, 461 So. 2d at 937-38.

On the following Saturday morning, after the police had seized the car, Mr. Bush went to the Martin County Sheriff's Department. At that point, Detective Lloyd Jones questioned Mr. Bush concerning the Slater homicide investigation (ROA 688). Mr. Bush initially denied involvement. The detectives told Mr. Bush that "only one person pulled the trigger" (ROA 721) indicating that this was something he should think about (ROA 710). "[T]hat's why we're talking to you the way we're talking. We know you ain't the one that pulled no trigger" (ROA 711).

At approximately 3:00 p.m. on that day, Mr. Bush said he would go with Detective Jones to West Palm Beach to "check out" an "alibi". "When it became clear that the alibi witness would not appear, Bush told the officers that they did not have to wait any longer because the witness would not be able to help him." Bush, 461 So. 2d at 938. He acknowledged his participation on the evening of the robbery. During the second statement, Mr. Bush identified Cave, Parker, and Johnson as being with him on that evening. In this statement he described his involvement and explaining that he did not shoot Ms. Slater (ROA 749-757).

After taking this statement, the detectives brought Mr. Bush back to the Sheriff's Department in Stuart, where a third statement was taken from him at 9:20 p.m. (ROA 767-786). He again described his involvement. Mr. Bush also explained that he felt remorse and regret over Ms. Slater's death, saying, "I hate that she's dead, because I have sisters at home" (ROA 778). The morning after the third statement, Mr. Bush was taken before a magistrate for a probable cause hearing. He was formally charged.

On May 7, 1982, the Jail Administrator of the Martin County Jail "received information" that Mr. Bush wanted to talk to Sheriff John Holt (ROA 650). Mr. Bush was taken to the Detective Bureau where a fourth statement was taken. He wanted the officers to know that he did not shoot or want to kill Ms. Slater and, in fact, that he neither killed her nor pulled the trigger (ROA 812). He admitted that he faked stabbing her, but explained that he felt he had no other choice: "The reason I'm here ... to make myself clear

that I didn't shoot her"; he explained that he faked stabbing her "not because I want to, cause I had no other choice"; "[a]nd when I went to the store, it wasn't for to rob or nothin. I went to get a pack of cigarettes. And then that's when everything took place" (ROA 812).

As the Florida Supreme Court would later summarize the evidence: "Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially." Bush, 461 So. 2d at 938. The medical examiner testified that no vital organs were involved in the victim's stab wound, that the wound was superficial and that the cause of death was a gunshot wound.

C. The Rulings of the Sentencing Judge and Florida Supreme Court

The jury, during deliberations, returned a question asking about the application of felony murder "to the verdict form" (ROA 1629). The trial court responded that "no distinction on the verdict form is necessary as both [premeditated murder and felony murder] are murder in the first degree" (Id.). Mr. Bush was convicted (ROA 1640-42). At the penalty phase, by a 7-5 vote, the jury recommended death (ROA 1630), and the court imposed that sentence (ROA 1308). The jurors were told that the death penalty was appropriate in cases of felony murder. The jury returned general verdicts at the guilt-innocence and sentencing phases. The jurors did not return interrogatories.

As the sentencing judge recognized (see, e.g., ROA 1304-05), Mr. Bush's jury was never required to make a finding regarding his individual intent and level of culpability. Florida's statutes and

rules also did not require the judge to make such a finding in order to justify imposition of the death penalty, and the judge said very little about the issue in his sentencing comments. Indeed, the only comments the judge made which touched on the issue came when he discussed a statutory mitigating factor. First, the judge noted that the only evidence heard about the offense (Mr. Bush's statements) showed that Mr. Bush was not the shooter:

> Of course, the only version of the actions that took place that night that we have come from your statements both out of court and in court. I guess we don't have to believe your statement, but since there is no other evidence we can't act upon anything that wasn't in evidence. So we must assume that you were an accomplice in the offense and we must assume, that from the evidence of Dr. Wright, that the actual death occurred as a result of the bullet wound and the only evidence, direct evidence that we have is that another person imposed that.

(ROA 1304-05) (emphasis supplied).

Acknowledging that Mr. Bush was culpable under the felony murder rule and that Mr. Bush was an accomplice, the judge stated that Mr. Bush participated in the underlying felonies in a way the judge would not characterize as "minor" under his view of the statutory mitigating factor:

> [T]he concept I have of what the legislature meant by relatively minor could fit other circumstances where a participant might be guilty under the felony murder rule, but that participant's actions might have been barely enough to come in under the rule. But here there certainly was activity by you that I cannot characterize as minor, so I do not find [that] mitigating circumstance ....

(ROA 1306).

Because Mr. Bush was involved in the felonies, the judge declined to find the statutory mitigator. The judge's comments are

strikingly akin to those of the state courts in Cabana v. Bullock, 474 U.S. 376 (1986), and Tison v. Arizona, 481 U.S. 137 (1987). Like the state courts in Tison, the judge stated that Mr. Bush did not withdraw (ROA 1306) in support of his conclusion that Mr. Bush participated in the felonies in a way the judge did not believe he should characterize as "minor" (ROA 1307). Like the state courts in Tison and Bullock, the judge relied on "participation" without making any findings as to Mr. Bush's actual intent.

The judge said: "You took the first step by stabbing her. You said you did not intend to kill her. Apparently the jury disbelieved that and I am privileged to disbelieve it as well" (ROA 1305).[2] He then said:

> In any event, what you did, stabbing her, making her fall to the ground, facilitated and cooperated with Parker in what he did next, and therefore in my opinion there is no way to say that what you did was relatively minor (ROA 1305) (emphasis supplied).[3]

There is no express finding in these general comments as to Mr. Bush's actual intent, Enmund; Bullock; as to whether he was recklessly indifferent to human life, Tison; or as to whether he ever intended that lethal force would be used against the decedent.

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[2] The jury was instructed on felony murder and accomplice liability theories. There is no evidence that the jury disbelieved Mr. Bush's statements -- those statements, as the Florida Supreme Court would later say and as the judge himself earlier had acknowledged, constitute "the only known version of the events" (ROA 1304). Indeed, the questions posed by the jury (quoted above) indicate that it convicted under the felony murder/accomplice theories.

[3] The judge made no mention of the fact that the evidence showed Mr. Bush was frightened and under the "domination" of Parker and Cave. See Bush, 461 So. 2d at 937-38.

Tison; Bullock. To the contrary, the evidence was that Mr. Bush "intended to set her free" when he "faked a blow at her." Bush, 461 So. 2d at 938. But the judge was not required by Florida's statute to make the requisite mental state findings and he did not make them.

On appeal, the Florida Supreme Court noted that "the only known version of the events" was Mr. Bush's statements; that the "statements are to the effect that he did not realize that [Cave, Parker and Johnson] were planning to rob the convenience store"; that "during and after the robbery he was under their domination"; that it was the accomplices who directed him while driving and who then "ordered him to stop"; that Mr. Bush did not intend to kill or harm Ms. Slater but "intended to set her free"; that the other accomplices decided that the decedent should be killed and "told Bush to dispose of her"; that "Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially"; and that "an accomplice, Parker, shot her." Bush, 461 So. 2d at 937-38. The Florida Supreme Court stated subsequently in its opinion that Mr. Bush participated in the "convenience store robbery" and that his actions, i.e., his participation, "contributed to the death of the victim." Bush, 461 So. 2d at 941. Like the state courts in Bullock and Tison, the Florida Supreme Court then made a sufficiency ruling, not a finding of fact, that the "participation" was "sufficient" to conclude that his "involvement constituted" intent or contemplation required by Enmund. Bush, 461 So. 2d at 941. Findings of fact regarding Mr.

Bush's individual mental state which meet eighth amendment requirements were not made by the state courts.

Given its factual recitation, it would have been illogical and contrary to the record and the Court's own construction for the Florida Supreme Court to make a finding of fact that intent or reckless indifference to human life had been established in this case. Indeed, the Court made no such finding, ruling instead that Enmund was satisfied because Mr. Bush was not as minor a participant as was Mr. Enmund, and that the "participation" is "sufficient" to "support a finding that his involvement constituted ... intent." Bush, 461 So. 2d at 941.

The only logical construction is that the Florida Supreme Court meant what it said: that it believed that Mr. Bush's participation or involvement in the felonies could be employed to rule that this case met Enmund and thus that participation or involvement was substituted for a mental state finding. This is not a finding of fact on intent or reckless indifference. And this type of sufficiency determination is the same as the one made by the state courts in Bullock and Tison -- that "by legal definition" intent could be found on the basis of active or major participation in the felonies. Cf. Cabana v. Bullock, 474 U.S. at 390 (A finding that "by legal definition" the defendant's involvement should be deemed to constitute intent does not satisfy Enmund).[4]

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[4] Had the state courts made a finding of fact of intent or reckless indifference, such a finding would not have made sense given the state courts' own findings that "the only known version of the events" were Mr. Bush's statements, that those statements (continued...)

D. The Eleventh Circuit's Misconstruction of This Court's Standards

As in Tison v. Arizona and Cabana v. Bullock, Mr. Bush's case involves a "sufficiency" ruling -- that there were actions which contributed to the crime, Bush, 461 So. 2d at 936 -- but is devoid of a state court finding of fact that Mr. Bush's intent was an intent to kill or that his mental state was one of reckless indifference to human life. As in Tison and Bullock, the ruling of the state courts in this case is at its essence a ruling that by "legal definition" Mr. Bush should be held responsible. See Bullock, 474 U.S. at 390.[5]

The Eleventh Circuit's post-Bullock cases, however, do not understand the principles established by this Court's precedent. Contrary to this Court's precedent, the Eleventh Circuit has thus consistently relied on state court "sufficiency" rulings to hold that the standards of Cabana v. Bullock, Enmund and Tison are met,

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[4](...continued)
related that Mr. Bush did not intend to kill the victim but "intended to set her free," that it was the other accomplices who decided to kill the victim, that Mr. Bush "not desiring to kill the victim" faked a blow at her which was superficial, and that "an accomplice, Parker, shot her." Bush, 461 So.2d at 938. Based on the recitation of the facts related by the Florida Supreme Court, the Court could not have found intent or reckless indifference by Mr. Bush in a manner comporting with the record and its own findings concerning what the record reflected. To construe what the state court held as anything other than a sufficiency ruling would be to conclude that the Florida Supreme Court rendered a ruling in contradiction of its own earlier findings.

[5] See Bullock, 474 U.S. at 389 (finding inadequate the state supreme court's findings that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson" and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson.")

even in cases where no state court mental state findings ("intent"/"reckless indifference") exist.

Members of this Court have noted the shortcomings in the review afforded Bullock/Tison/Enmund issues in the Eleventh Circuit and have analyzed the need for certiorari review to resolve the problem. See Smith v. Dugger, ___ U.S. ___, 110 S.Ct. 1511, 1511-13 (1990) (Marshall, Brennan and Blackmun, JJ., dissenting from denial of certiorari) (discussed below). The Eleventh Circuit's approach, said the dissent in Smith, was "a grave departure from our precedents by ... a court with a major role in the administration of this Nation's death penalty law." Id. at 1512. Mr. Bush's case was substantially affected by the shortcomings in the Eleventh Circuit's application of the Tison/Bullock/Enmund standards.

Here, the Eleventh Circuit acknowledged that no jury finding of intent exists. The Eleventh Circuit also declined to rely on the Florida Supreme Court's opinion, conceding that the requisite finding was not made by the state supreme court, although rejecting Petitioner's argument that such a finding would have contradicted "the only known version of the events" which the state supreme court itself found to be disclosed by this record. See Bush v. Singletary, 988 F.2d 1082, 1088 (11th Cir. 1993).

What the Eleventh Circuit did here was to rely on the trial judge's "sufficiency" finding. Bush, 988 F.2d at 1088 ("We hold that the trial judge's finding satisfies the requirement imposed by Enmund and its progeny.") As discussed above, however, the trial

judge's only "finding" in this case, made when rejecting a statutory mitigator, was that Petitioner's "participation" in the crimes was not "minor" and that the statutory mitigator would therefore not be found. Neither was the "participation" of the defendants in Tison or Bullock "minor." Although their "participation" was much more substantial than that of Mr. Bush, in each case this Court found the state courts' findings -- findings strikingly akin to what the judge said here -- insufficient.

Nowhere did the judge (or, for that matter, the jury or Florida Supreme Court) make a finding of fact on Mr. Bush's individual intent; on whether Mr. Bush had a reckless indifference to human life; or on whether Mr. Bush wanted Ms. Slater to be killed. To the contrary, the judge and the Florida Supreme Court noted that the statements, the only evidence in this case, were that "you did not intend to kill her" (ROA 1305, judge's comments); that Mr. Bush did "not desir[e] to kill the victim," Bush, 461 So. 2d 938; and that Mr. Bush "intended to set her free." Id.

What the judge did here was what the state courts did in Bullock and Tison. He said, in essence, that Bush was not as "minor" a participant as was Mr. Enmund. What the Florida Supreme Court did here was also akin to what the state courts did in Bullock and Tison -- it found that because Mr. Bush was not as "minor" a participant as Mr. Enmund, his "participation" could be substituted for a finding of intent. Bush, 461 So. 2d at 941. It relied on a "sufficiency" ruling -- that Bush's "participation is sufficient to support a finding that his involvement constituted

the intent or contemplation required by Enmund," Bush, 461 So. 2d at 941 -- instead of making a finding of fact.

The Eleventh Circuit's misunderstanding of Bullock and Tison is not new. In the past, members of this Court have noted that the shortcomings in the review afforded Bullock/Tison/Enmund issues in the Eleventh Circuit warrants certiorari review. Thus, in Smith v. Dugger, ___ U.S. ___, 110 S.Ct. 1511, 1511-13 (1990), Justices Marshall, Brennan and Blackmun each dissented from the denial of certiorari. As the opinion of Justices Marshall and Brennan explained:

> In Enmund v. Florida, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376, 73 L.Ed.2d 1140 (1982), we held that imposing a death sentence on a defendant "who does not himself kill, attempt to kill, or intend that a killing take place" violates the Eighth and Fourteenth Amendments' prohibitions against cruel and unusual punishment. In Cabana v. Bullock, 474 U.S. 376, 390-91, 106 S.Ct. 689, 699-70, 88 L.Ed.2d 704 (1986), the Court reaffirmed and expanded upon Enmund, holding that the federal courts could not make the determination that a defendant met one of the Enmund criteria on their review of state court judgments. Rather, we held that "the State's judicial process leading to the imposition of the death penalty must at some point provide for a finding of that factual predicate." Ibid. In Tison v. Arizona, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987), this Court held that a showing of both reckless indifference to human life and major participation in a felony would be sufficient to satisfy Enmund. The Court refused to make those findings itself, however, instead remanding to the state courts for a determination whether those factors were present. Ibid.
>
> In this case, the Court of Appeals for the Eleventh Circuit found that Enmund, Cabana, and Tison were satisfied solely on the basis of the Florida Supreme Court's determination that there was sufficient evidence from which the jury could have found that defendant had the intent to kill. In refusing to review the decision below, this Court sanctions a grave departure from our precedents by a panel of a court with a major role in the

administration of this Nation's death penalty law. Accordingly, I dissent.

Respondent does not dispute the basic rule that a State may not sentence to death a defendant "who does not himself kill, attempt to kill, or intend that a killing take place," Enmund, supra, 458 U.S., at 797, 102 S.Ct., at 3376, unless that defendant was a major participant in a felony and exhibited reckless indifference to human life, Tison, supra, 481 U.S., at 158, 107 S.Ct., at 1688. Nor does respondent suggest that a federal court may make the required finding. Instead, the issue in this case is whether a state court's conclusion that "there was sufficient evidence from which the jury could have found [Smith] guilty of premeditated murder," Smith v. State, 424 So.2d 726, 733 (1983), constitutes the culpability finding required by our cases.

The entirety of the Eleventh Circuit's reasoning on this point is that "[i]mplicit in [the Florida Supreme Court's sufficiency] finding is the conclusion that Smith had the intent to kill." 840 F.2d 787, 793 (1988). Simply asserting a conclusion is hardly sufficient to justify it, especially where, as here, the conclusion is so plainly farfetched. The Florida court's finding that the evidence was sufficient for Smith's jury to find him guilty of premeditated murder is nothing more than a finding that reasonable people could have found that verdict justified; it is emphatically not a finding that this jury did determine that Smith's acts were premeditated. Indeed, the Cabana Court rejected as insufficient a state court's statement far more conclusive than the one here. There, the Mississippi Supreme Court found that "the evidence [was] overwhelming that [defendant] was an active participant in the assault and homicide." Cabana, supra, 474 U.S., at 389, 106 S.Ct., at 698. Although this finding was "sufficient to make [the defendant] liable for the murder and deserving of the death penalty in light of Mississippi law," it did not satisfy the Eighth Amendment. Ibid.

That the Florida court did not make the required finding is particularly apparent from an examination of its opinion as a whole. In response to an unrelated guilt-phase point of error, the court found that Smith could have been found guilty and sentenced to death on either of two theories, one of which was the felony-murder doctrine. 424 So.2d, at 731. "Under this theory the jury would not have needed to conclude that [Smith] had the requisite intent." Id., at 731-732. The Florida Supreme Court's sufficiency determination thus in no way establishes that Smith's jury found the essential factual

predicate to a death verdict under Enmund, especially in light of the court's acknowledgement that the jury was instructed that it could convict Smith regardless of his intent.[6]

It is tempting to view the Eleventh Circuit's ruling in this case as an unfortunate aberration that should be disregarded as such. Perhaps such a hope has informed this Court's decision to deny certiorari. Nonetheless, the refusal to review the decision below has important consequences. A panel of a Court of Appeals with jurisdiction over the death penalty statutes of three States has equated a state appellate court's finding that there was sufficient evidence from which a jury could have found intent to kill with a finding that the defendant did in fact intend to kill. The panel came to that conclusion notwithstanding that the jury was instructed that it could return a sentence of death even if it did not believe that Smith had the requisite intent. Sufficiency of the evidence claims are routinely made in state death penalty appeals, and state appellate courts invariably will have to make a sufficiency finding in the course of their review. To permit such a finding to satisfy Enmund, Cabana, and Tison is to viscerate their protections. Because I do not think it seemly or sensible for this Court to permit a significant violation of the Eighth Amendment to stand, simply on the hope that it will have no effect beyond the immediate case, I dissent.

Id. at 1511-13 (emphasis in original).

The Eleventh Circuit's approach had an effect beyond the Smith case. Although acknowledging that the jury's verdict did not "answer the culpability question in this case," the Eleventh Circuit Court of Appeals affirmed here, as it did in Smith,

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[6] The footnote stated: "Of course, after Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Florida courts were not required to find that Smith intended to kill in order to satisfy the Eighth Amendment. A finding that he was recklessly indifferent to human life and a major participant in the felony would have satisfied Tison. Id., at 158, 107 S.Ct., at 1688. The Florida courts did not even purport to make the finding required by Tison, however. The only finding in the Florida courts on which respondent relies is the finding that there was sufficient evidence from which the jury could have found Smith guilty of premeditated murder."

although the only thing the state courts found was "major participation," without finding that the Petitioner intended or attempted to kill, wanted the decedent killed or was recklessly indifferent to human life. The Eleventh Circuit affirmed here, as in Smith, although the state courts' ruling, at best, involved no more than a "sufficiency" determination. And the Eleventh Circuit affirmed here solely on the basis of the comments of a state judge who was not required to make Enmund mental state findings; who did not make such findings (the judge never found that Mr. Bush intended or attempted to kill, nor that he was recklessly indifferent to human life); and whose only comments, made when rejecting a statutory mitigating factor relating to minor participation in felonies, were that he would not characterize the Petitioner's "participation" as "minor," not that the Petitioner intended to kill or was recklessly indifferent to human life and not that Mr. Bush's intent was the same as Parker's and Cave's.

E. Conclusion

To effectuate the eighth amendment principles embodied in Enmund, this Court has held that the state courts must expressly find at least that the defendant was a "major participant" and either intended to kill or had a "reckless indifference" to human life. Tison; Bullock. Both participation and mental state findings are needed under Tison and Bullock. All that the judge and Florida Supreme Court found here was the first part of the two-part finding which Tison and Bullock require.

Nowhere did the jury, Florida Supreme Court or trial judge find that Mr. Bush intended to kill, attempted to kill or was recklessly indifferent to human life. There is no express mental state finding from the jury, Florida Supreme Court or trial judge here. Bullock and Tison expressly hold that state court "sufficiency" determinations -- that as a matter of accomplice law the defendant should be held responsible because of his participation -- are insufficient to meet the eighth amendment requirement of express findings of fact as to the defendant's mental state. In Petitioner's case, the state courts' rulings involve no more than such a "sufficiency" determination and the Court of Appeals' ruling is directly in conflict with this Court's precedents.

This departure from the standards of Enmund, Bullock and Tison again comes to this Court from the Eleventh Circuit Court of Appeals -- a court "with a major role in the administration of this Nation's death penalty law." Smith v. Dugger, ___ U.S. ___, 110 S.Ct. 1511, 1512 (1990) (opinion in dissent from denial of certiorari). The ruling in Mr. Bush's case is not "an unfortunate aberration." Id. at 1513. It will affect other cases in that Court.

The Eleventh Circuit's decision is in conflict with this Court's precedents. The Eleventh Circuit's cases demonstrate that that Court's misapplication of Bullock, Tison and Enmund is a recurring problem. That Court's misapplication of Bullock, Tison and Enmund cannot be squared with this Court's law. And that

Court's recurring misapplication of Bullock and Tison has, in practice, overruled those precedents.

If Bullock and Tison are to be overruled, this Court should say so. If not, the conflicts with this Court's precedents engendered by the Eleventh Circuit's decision and the substantial problem arising from the Eleventh Circuit's misconstruction of what Bullock and Tison require warrant the granting of this petition for writ of certiorari.

(II)

THE CONFLICTS BETWEEN THE STANDARD APPLIED BY THE ELEVENTH CIRCUIT TO PETITIONER'S CLAIM OF JURY INSTRUCTION ERROR AND THIS COURT'S PRECEDENTS

A. Introduction

While this Court long ago found the death penalty statues and practices of several states to be facially constitutional, see, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 US. 262 (1976), the Court has continued over the years to strike down death sentences when misleading, improper, inadequate or insufficient instructions are provided to capital sentencing juries. See Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990); Caldwell v. Mississippi, 472 U.S. 320 (1985); Godfrey v. Georgia, 446 U.S. 420 (1980); Hitchcock v. Dugger, 481 U.S. 393 (1987); Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926 (1992). In these cases, this Court has sought to assure that instructions not allow unreliable, arbitrary or misleading factors to interfere with

capital juries' sentencing deliberations. Mills; McKoy; Caldwell; Espinosa.

The Florida jury plays a substantial role in capital sentencing. Espinosa, 112 S.Ct. at 2928-29. Because its decision can be ignored only in rare cases, it is treated as "sentencer" for purposes of eighth amendment review. Id. at 2928-29. Error in sentencing instructions provided to capital juries in Florida directly implicate the eighth amendment. Id.

The jury in Petitioner's case, a jury which ultimately returned a 7-5 death vote, was provided misleading and inaccurate instructions as to its role at capital sentencing. Those instructions interjected inappropriate considerations into the jury's deliberations. And it cannot be said "with any degree of confidence" that reasonable jurors would not be misled and misinformed by the instructions in this case. Mills v. Maryland, 486 U.S. 367, 383-84 (1988).

The Eleventh Circuit, however, denied relief without citing, much less so discussing, this Court's precedents in cases such as Mills, McKoy and Caldwell. The Eleventh Circuit rejected Petitioner's claim without mentioning, much less so applying, this Court's precedents mandating a degree of "certainty" and "confidence," Mills, 486 U.S. at 377, 383, before a petitioner's contention that his or her jury was misinstructed about its role at capital sentencing can be rejected. And the Eleventh Circuit rejected Petitioner's contention without acknowledging that, under this Court's precedents, reversal is required when there exists a

"substantial risk that the jury was misinformed as to its role." Caldwell v. Mississippi, 472 U.S. 320, 110 S.Ct. 2633, 2646 (1985); Mills, 488 U.S. at 381.

B. The Inaccurate Instructions To The Jury

Under Florida's capital sentencing scheme, a jury's recommendation that the death penalty be imposed need not be unanimous, but by a simple majority. If a majority does not vote for death, the jury's recommendation is life; thus, if the jury's vote is six to six, the recommendation is one for life, and the defendant has the right to that verdict. During the proceedings resulting in John Bush's death sentence, the prosecutors' comments and judge's instructions deprived him of that right.

During voir dire, the prosecutor informed the jurors of what he believed the law required of them. He repeatedly told them that their recommendation as to life or death "has to be by a majority of you. It requires seven or more for any advisory sentence" (ROA 45) (emphasis supplied). Time and time again, the prosecutor reiterated his theme, telling the jurors that the verdict form on which they would make their recommendation read, "We the jury, a majority of the jury ... advise that the Court impose death or advise the Court impose a life sentence ..." (ROA 222) (emphasis supplied). Finally, in contrasting the jurors' duty to reach a unanimous verdict at guilt-innocence with their function at sentencing, the prosecutor stated:

> Now, the first phase is the guilt or innocence phase and that requires a unanimous verdict. All 12 of you must agree. The second phase requires a majority verdict, 7 of you must agree and concur on an advisory sentence.

(ROA 252) (emphasis supplied).[7]

Echoing the prosecutor's contrast between the guilt-innocence and sentencing verdicts, the trial judge's sentencing instructions reiterated the erroneous majority vote requirement. The judge made four comments about the jury's vote in his instructions, three of which repeated the prosecutor's improper construction. The first two were:

> - "In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury." (ROA 1290).
>
> - "The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily ..." (ROA 1290).

A few moments later, the judge mentioned in one line that "if by six or more votes" the jury voted for life, it may recommend life (ROA 1290). That brief, passing reference to the proper legal standard was rendered virtually irrelevant, however, by the final instruction the judge provided to the jury shortly thereafter. This instruction, the last one the jury received regarding the process they were to employ in arriving at a verdict and the one

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[7] The prosecutor also told the jury that the beyond a reasonable doubt standard was not a factor at the penalty phase (see, e.g., ROA 48-49); urged the jury to allow their sentencing responsibility to be shifted to the judge (ROA 1279-80, 1271, 154-57, 220-23, 251-52, 258, 275, 277, 297); suggested that the death penalty had been legislatively deemed proper in this case (ROA 1270); argued for death on the basis of "sympathy" towards the victim's parents and sister (ROA 1279-81); and argued that the jury should not have sympathy towards Mr. Bush (Id.).

they heard immediately before retiring to deliberate, told the jury:

> You will in just a moment retire to consider your recommendation. When seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to this court.

(ROA 1290-91) (emphasis supplied).

The jury returned with a 7 to 5 recommendation for death (ROA 1295). Three of the four instructions they received were inaccurate.

Under the circumstances, the final instruction regarding the jury's vote, particularly when combined with the reinforcement previously received from the judge himself and the prosecutor, would have misled a reasonable juror, giving such a juror the erroneous impression that a majority was needed for life or death. Reasonable jurors hearing the prosecutor's comments, the inconsistent instructions, and then the final instruction, could quite logically believe that a majority vote was needed for a life verdict -- the bulk of what the jury heard directed that a majority was needed to vote for life; the one-line correct statement was overshadowed by the improper instructions and comments; and the first and last instructions the jury heard at sentencing were the improper ones. The instructions were inaccurate, misleading and confusing.

C. The Conflicts With This Court's Precedents Engendered By The Eleventh Circuit's Ruling

The Eleventh Circuit acknowledged that "[p]ortions of both the prosecutor's comments during voir dire and the trial court's

instructions suggest that a vote of seven was required for any recommendation." Bush v. Singletary, 988 F.2d 1082, 1089 (11th Cir. 1993). The Court, however, rejected Mr. Bush's claim because "[o]n one occasion" what the judge said was not inaccurate and because it did not see "evidence to suggest that the jury was confused or divided six to six..." Id. at 1089 (emphasis supplied).

That is not this Court's standard. The Eleventh Circuit's analysis is in direct conflict with this Court's precedents. In Caldwell and Mills, each cited and discussed by Mr. Bush below but neither discussed nor applied by the Eleventh Circuit, this Court held that when what capital jurors are told about their role creates an inaccurate and "misleading picture of the jury's role," eighth amendment error is established and relief is warranted." Caldwell, 105 S.Ct. at 2646. Accordingly, when it is "plausible" that the jury was misled by an inaccurate instruction or when the reviewing court "cannot conclude, with any degree of certainty, that the jury did not adopt [the inaccurate] interpretation of the jury instructions," relief is appropriate. Mills, 486 U.S. at 378.

The Eleventh Circuit did not apply these standards. To the contrary, it imposed on Petitioner the burden of pointing to specific "evidence" about the jury's confusion. Bush, 988 F.2d at 1089. This is not how jury instruction claims are resolved. No case from this Court holds that jury instruction issues can be constitutionally resolved in such a manner. Indeed, since neither this Petitioner nor any other (nor, for that matter, any court) has access to the jury room, no court could impose such a standard.

The Eleventh Circuit's approach not only renders meaningless the standards of Caldwell and Mills, it lacks common sense.

As this Court directly explained in Mills: "There is, of course, no extrinsic evidence of what the jury in this case actually thought." Id. at 381. As in other cases involving jury instruction issues, however, the Court had the judge's instructions: "Our reading of those parts of the record leads us to conclude that there is at least a substantial risk that the jury was misinformed." Id. at 381 (emphasis supplied); see also Caldwell, supra.

As in Mills, 486 U.S. at 381, there is an "additional bit of evidence" in Mr. Bush's case about the inaccuracy of the instructions: the Florida Supreme Court, like the Maryland appellate court in Mills, found that instructions such as those provided here were not proper and promulgated new instructions to correct the problem. Thus the current standard Florida instructions direct judges to inform the jury that a six-to-six vote is a life verdict, without providing any of the misleading and inaccurate instructions given by the judge in Mr. Bush's case. See Fla. Standard Jury Instructions in Criminal Cases, Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases, "Penalty Proceedings - Capital Cases" (June, 1992, amendments).

The Court of Appeals' imposition of a burden on the Petitioner to point to "evidence" of actual confusion on the part of this jury is directly at odds with this Court's standards:

> No one on this Court was a member of the jury that sentenced [the Petitioner], or of any similarly instructed jury.... We cannot say with any degree of confidence which interpretation [the Petitioner's] jury adopted.

Mills, 486 U.S. at 383. But here, as in Caldwell and Mills, because "[e]volving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case[, the] possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." Mills, 486 U.S. at 383-84.

The Eleventh Circuit failed to abide by this Court's holdings that in the capital sentencing context, jury instructions that are inaccurate, confusing, contradictory, or misleading are not tolerated because of the eighth amendment's requirement of reliability. See Mills v. Maryland, 486 U.S. at 383-84; McKoy v. North Carolina, 494 U.S. 433 (1990); Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985). This standard applies to instructions concerning the jury's functions. McCoy; Mills; Caldwell. And the inconsistency and inaccuracy here surely "create[d] a misleading picture of the jury's role." Caldwell, 105 S. Ct. at 2646.

Mr. Bush's jury reached a death verdict by the narrowest of margins -- 7-5. The error actually mattered in Mr. Bush's case, and mattered in a way that could have been determinative of the sentence ultimately imposed. The jury was within one vote of a life recommendation. A juror's vote may well have been affected by the instructions -- a reasonable possibility exits, in light of the

instructions provided, that a juror may have changed his or her vote in order to reach a consensus.

Reasonable jurors hearing these instructions, after all, could have believed that a tie verdict was not a real verdict and that a majority had to be reached one way or the other. The instructions were, at best, confusing. The erroneous instructions were not a technical error here -- the vote here shows that the jury was very close and one vote would have made a difference.

The risk that a juror's vote may have changed to death in order for a consensus to be reached, a real possibility under these instructions, is intolerable in a capital case. Such a risk interjects a level of arbitrariness and unreliability not countenanced by the eighth amendment. Such a risk is one which the eighth amendment "dare[s] not risk." Mills, 486 U.S. at 384.

This jury recommended death by the slimmest of margins -- one vote. The incorrect and misleading instructions created the intolerable risk that a death sentence may have been imposed because of the effect of the erroneous instructions. Inconsistently emphasizing to the jury that it had to reach a majority life verdict "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention" from its proper functioning. Beck v. Alabama, 447 U.S. 625, 642 (1980). The instructions may have encouraged the jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required -- and thus "introduce[d] a level of

uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643.

The Eleventh Circuit neither applied, nor discussed, nor followed this Court's precedents. To the contrary, that Court has fashioned and applied a standard of review which is supported by no decision from this Court. No case from this Court holds that claims of jury instruction error in capital sentencing can be addressed by the standard articulated by the Court of Appeals.

The Court of Appeals' decision is in conflict with this Court's standards. The standard fashioned by the Court of Appeals, however, is the law of the Eleventh Circuit. The conflicts and substantial questions arising from that Court's law and its application in this case warrant the granting of this petition for writ of certiorari.

(III)

THE CONFLICTS BETWEEN BUSH AND THIS COURT'S PRECEDENT ADDRESSING QUESTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT CAPITAL SENTENCING

A. Introduction

"To investigate and develop available mitigating evidence" is "a basic and unshakable obligation of defense counsel" in capital cases. Bush v. Singletary, 988 F.2d 1082, 1093 (11th Cir. 1993) (Kravitch, J., dissenting), citing Strickland v. Washington, 466 U.S. 668, 691 (1984), and quoting the Strickland holding that counsel must "make reasonable investigations or ... make a reasonable decision that makes particular investigations unnecessary." "At least" since Lockett v. Ohio, 438 U.S. 586

(1978), the "importance of presenting mitigating evidence has been a prominent feature of the Supreme Court's Eighth Amendment jurisprudence." Bush, 988 F.2d at 1094 (Kravitch, J., dissenting) (citations omitted). As Judge Kravitch also noted, because "[r]easonable investigation ... [is a] prerequisite for constitutional assistance of counsel," "[w]hen counsel breaches the duty of reasonable investigation, even strategic or tactical decisions regarding the sentencing phase, which normally are entitled to great deference, must be held constitutionally deficient." Id. at 1094.

Petitioner's counsel developed no mitigating evidence and presented none. Counsel admitted at the evidentiary hearing that he undertook no efforts which can be deemed "reasonable" investigation or preparation under the law this Court established in Strickland v. Washington. See section B, infra (outlining counsel's hearing testimony). And he admitted that he had no "tactic" or reason for failing to investigate. As a result of his failures, a substantial body of available mitigating evidence, evidence which surely would have made a difference to this 7-5 jury, was not known to counsel and, consequently, not heard by the jury and judge at sentencing. See Bush, 988 F.2d at 1096-97 (Kravitch, J., dissenting) (discussing the evidence and concluding: "nearly half of Bush's jurors were inclined to mercy notwithstanding Muschott's defective performance. Substantial mitigation was available if Muschott had only conducted a basic investigation. There is far more than a mere reasonable

probability that John Earl Bush today faces execution because of constitutionally ineffective assistance of counsel.") The evidence is outlined in detail in Judge Kravitch's dissenting opinion. Bush, 988 F.2d at 1096-97.

B. The Eleventh Circuit's Current Review Of Ineffective Assistance of Counsel Claims, And The Review Afforded In This Case, Are In Conflict With This Court's Precedent

In Strickland v. Washington, 466 U.S. 668 (1984), this Court established the standards applicable to cases such as this one. Those standards, standards at the core of Judge Kravitch's dissent, were ignored by the Eleventh Circuit panel's majority. In Strickland this Court held that "strategic choices made after a thorough investigation of law and facts ... are virtually unchallengeable." Id., 466 U.S. at 690. However, "strategic choices made after less than a complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id.

Under Strickland, if counsel does not "make reasonable investigations" or "make a reasonable decision that makes particular investigations unnecessary," Strickland, 466 U.S. at 691 (emphasis supplied), the Petitioner has established deficiency in counsel's performance. Strickland instructs reviewing courts to consider what the attorney actually did or did not do, why the attorney did or did not do it and whether his or her actions were prejudicial.

Notwithstanding these principles, in a disturbing number of cases the Eleventh Circuit has recently required capital

petitioners to "prove that the approach taken by defense counsel would have been used by no professionally competent counsel...." White v. Singletary, ___ F.2d ___, No. 90-3629 (11th Cir. Sept. 3, 1992), slip op. at 4-5, relying on Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1988) (en banc). The Court has gone so far as to find irrelevant any evidence about counsel's deficiencies which may be disclosed at an evidentiary hearing, so long as it concludes that the petitioner cannot prove that no other professional attorney would have acted in a way akin to that of defense counsel in the case at issue. See Harich, 844 F.2d at 1470. Irrespective of the attorney's level of preparation, or the validity of the decisions made by the attorney, if another attorney could have acted in a way similar to that of the attorney whose conduct is at issue, these Eleventh Circuit decisions hold that relief should not be granted. Harich, 844 F.2d at 1470-71; White, slip op. at 4-5.

In conjunction with this approach, the Eleventh Circuit has also relied on a defense attorney's assertions to deny relief, no matter how untenable the attorney's assertions may be. If the attorney says he had a "strategy," the Court will deny relief irrespective of how uninvestigated, unprofessional or uninformed the strategy may be. The attorney's bald assertion thus often suffices. This too, however, is not what Strickland held -- under Strickland, an attorney has a duty to make a reasonable investigation or a reasonably informed decision that makes a particular investigation unnecessary. Id. at 691.

These troubling recent approaches of the Eleventh Circuit were the foundation of the Eleventh Circuit panel majority's opinion in Petitioner's case. That decision is plainly in conflict with the standards articulated by this Court in Strickland v. Washington, as Judge Kravitch's dissenting opinion thoughtfully articulated.[8]

Noting that defense counsel "Muschott failed to conduct even a minimally adequate search into Bush's background," Bush v. Singletary, 988 F.2d at 1094 (Kravitch, J., dissenting), Judge Kravitch explained:

> At the evidentiary hearing in the district court, Muschott conceded that he prepared no mitigating evidence whatsoever to present at sentencing. Dist.Ct.Tr. at 402. He never looked into Bush's psychological history. He never sought Bush's school or prison records. Id. at 319. He never developed evidence of the hardships of Bush's abusive and tragic life growing up in a family of seasonal farmworkers. Id. at 321. He never developed any evidence that might have explained or softened the effect on the jury of Bush's 1974 conviction.[9] Id. at 344. These items were not hidden facts, discoverable only through substantial effort. They were basic background facts and records which the most cursory investigation and preparation would have revealed. And, significantly, Muschott admitted that he did not have a reasonable, tactical reason for not seeking or developing much of this evidence. See, e.g., id. at 319. He simply did not do it.

Id. at 1094 (emphasis supplied). Judge Kravitch outlined the actual evidence:

> Had Muschott conducted a competent investigation he would have discovered information that certainly would have informed, and might very well have altered, his

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[8] Given the substance of Judge Kravitch's opinion and the clarity with which it states the issues, it is incorporated herein.

[9] The footnote stated: "In fact, Muschott admitted he never even obtained the transcript of, or the Division of Youth Services records about, that case. Dist.Ct.Tr. at 296."

> decision not to present any evidence in mitigation. A 1974 report that was included in Bush's incarceration records, for example, stated that Bush had an obsessive-compulsive personality with an incipient pathology, uncertain control of his impulses, and sometimes loosened ties to reality. The reporting doctor worried that Bush was primed for a "possible future psychosis" which might be hastened by "any stress situation."[10] This warning is consistent with the testimony in the district court of Dr. Carbonell, who reported that Bush possesses borderline intellectual functioning and possibly suffers form brain damage and other mental health problems. It suggests that Bush may have suffered from a severe emotional disturbance at the time of the homicide in this case, a statutory mitigating circumstance under Florida law. Fla.Stat.Ann. §921.141(6)(b). Even if Bush's mental health problems did not rise to the level of a severe emotional disturbance, the 1974 report identifies some mental health problems which could have been introduced at the penalty phase as a non-statutory mitigating circumstance. At the very least, the report would have placed Muschott on notice that further investigation into Bush's psychological state was necessary.

Bush, 988 F.2d at 1094-95. She explained that "Muschott had every chance to develop mental health mitigation but neglected to do so." Id. at 1095. "[T]he state trial court appointed a psychiatrist, Dr. Tingle, and a psychologist, Dr. Sobel, to assist the defense. Yet Muschott met with Dr. Tingle only once, for approximately thirty minutes, no more than ten minutes of which were spent talking about potential mitigating evidence.[11] He did not meet with Dr. Sobel at all. He did not have either doctor examine or evaluate Bush. Nor did he provide either doctor with Bush's

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[10] The footnote stated: "Bush's subsequent years in prison where, as a teenager, he apparently was raped and assaulted would undoubtedly constitute a 'stress situation.'"

[11] The footnote stated: "In an affidavit, Dr. Tingle stated that '[n]o one discussed mitigating circumstances with [him] or asked [him] to conduct an evaluation in that regard.'"

previous psychological reports. Indeed, he could not provide the doctors with Bush's records because his failure to conduct a basic documentary investigation left him ignorant of their existence." Id. at 1095 (emphasis in original). As Judge Kravitch summarized:

> Based solely on his own relatively cursory and wholly untrained observations that Bush had no problems communicating, had demonstrated the ability to weigh options and make his own decision, and was "calm, cool, and collected," Muschott abandoned a potentially life-saving sentencing strategy.

Id. Judge Kravitch then discussed the majority's opinion, and its inconsistency with Strickland:

> The majority holds that "[g]iven what Muschott could readily observe about Bush, what Muschott knew of Bush's background and the advice of Dr. Tingle, Muschott acted within the wide range of reasonable professional judgment." Ante at 1092. "[W]hat Muschott knew," however, was crucially limited by his failure to conduct a reasonable documentary investigation. Had Muschott obtained Bush's easily obtainable incarceration records, as he should have, he would have been aware of Bush's earlier psychological reports and surely would have realized the importance of Bush's court-appointed doctors examining him and reviewing his records. Furthermore, Muschott must have known that nothing could be determined reliably about Bush's mental health status without psychological testing and that a mental health strategy should not be abandoned until Dr. Sobel performed those tests. See Dist.Ct. Exh. 8, attach. 5 (Dr. Tingle's notes); Exh. 14(d) (Muschott's notes). Dr. Sobel was available to test Bush. Muschott simply declined to have her do the tests.

Id. at 1095. Dr. Tingle's notes from the time of the trial proceedings and affidavit (Exh. 8) stated that no one asked him to evaluate mental health-related mitigating circumstances; that neither he nor Dr. Sobel were ever asked to see and evaluate Mr. Bush; and that no one discussed mitigating circumstances with him. Defense counsel's notes from the time of the trial proceedings

(Exh. 14(d)) stated that after his meeting with Dr. Tingle, he concluded that the judge should order that Mr. Bush be "order[ed] ... up here ... for testing" and that records regarding "Bush's past history of psychiatric disorder" should be obtained. The arrangements were never made. Although the doctors were available and counsel's own notes related the need for an examination, counsel never arranged for them to see Mr. Bush.

And although evidence (from family, employers, ministers, teachers, and others) was available which would have established substantial mitigation, counsel did virtually nothing to investigate it. As he acknowledged at the hearing, he had no tactic for his failure to investigate.

Judge Kravitch discussed the failures apparent in counsel's abdicating of the duty to reasonably investigate evidence about Mr. Bush's background:

> Muschott likewise was inexcusably unaware of information that would have explained or softened the impact of Bush's 1974 conviction and thirty-year sentence for rape and robbery. This failure tainted two important defense strategy decisions. First, Muschott decided not to attempt to mitigate the effect on the jury of evidence presented by the State that Bush had been convicted of rape and robbery and sentenced to thirty years' imprisonment.[12] Even more significant, Muschott chose not to present any evidence of Bush's difficult family background or positive character traits.[13] He made

[12] The footnote stated: "Under Florida law, prior conviction of a violent crime is a statutory aggravating circumstance. See Fla. Stat.Ann. § 921.141(5)(b)."

[13] The footnote stated: "Several witnesses would have testified, for example, that Bush is a loving and devoted father to his daughter, who has Down's Syndrome, and that he once saved the life of a young child who was drowning. See, e.g., Affidavits of Debora Mitchell, Denise Bush & Janie Nicholson."

> these decisions because he feared that the State, in rebuttal, would reveal the details of the 1974 crime. Because of his complete failure to investigate, however, Muschott did not know that Florida officials, whose opinion likely would have carried great weight with the jury, were on record as stating that Bush's conduct had been far from the cold act of a heinous criminal. Bush's 1974 presentence investigation report found that he "does not impress one as being a hard nosed street kid. Instead he impresses one as being a youth who has inadvertently involved himself in a very serious adult crime." The report concluded that Bush should suffer the minimum amount of retribution allowable by the Court. Bush's sentencing judge went further. He stated that he did not believe that Bush's conduct warranted even the minimum sentence imposed by Florida law, though of course he could not sentence Bush to less than the statutory minimum. If Muschott had been aware of this information, he might very well have chosen to introduce humanizing evidence of Bush's family background and character traits, knowing that if the State attempted to countermand that evidence with the 1974 crime, he could surrebut with the statements of the Florida officials.

Id. at 1095-96.

Judge Kravitch summarized what the record disclosed about Muschott's actual preparation:

> In sum, Muschott's investigative effort in preparing for the penalty phase of Bush's trial amounted to one short conversation with Dr. Tingle based solely on Muschott's own inconsiderable and untrained observations and a few conversations with Bush's father, brother, and girlfriend, most of which were initiated by them. In my view, Muschott failed to discharge his duty of reasonable investigation. Consequently, his strategy at sentencing -- doing nothing more than asking the jury to listen to the one of Bush's four statements in which he sounded most remorseful -- was constitutionally tainted.

Id. at 1096.

Then, directly addressing the shortcomings in the majority's approach, Judge Kravitch wrote:

> Muschott also failed to render constitutionally adequate assistance of counsel when he chose not to introduce mitigating evidence that could not reasonably have opened the door to damaging evidence in rebuttal.

> Muschott feared that if he introduced mitigating evidence, including Bush's sympathetic background and intellectual and mental health deficiencies, the State would introduce statements by Bush's codefendants that his involvement in the murder had been extensive, as well as details of the 1974 crime. Much of the mitigating evidence that might have persuaded the jury to vote for life, however, was completely distinct from this potential rebuttal evidence. That Bush is the loving father of a daughter with Down's Syndrome or once saved a drowning child, for example, has nothing to do with the details of the 1974 crime or the extent to which Bush participated in the murder, and cannot reasonable have given rise to the fear of rebuttal. The same goes for Bush's mental health problems and for the hardships Bush endured as an abused child in a family of seasonal workers, with a disabled and alcoholic father and a mother who died when he was just a boy.[14]

Id. at 1096 (emphasis in original). Applying this Court's standards, Judge Kravitch noted:

> I agree with the majority that Muschott acted reasonably when he asked the jury to listen to the statement in which Bush sounded most remorseful. The Sixth Amendment problem in this case is not with what Muschott did but what he did not do. He did not conduct a constitutionally adequate investigation into Bush's background and he did not introduce significant evidence that could not reasonably have given rise to damaging rebuttal. That counsel made many competent decision does not preclude a finding of ineffective assistance of counsel. The right to effective assistance of counsel may be violated "by even an isolated error of counsel if that error is sufficiently egregious and prejudicial."[15] Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); accord Strickland, 466 U.S. at 693-96, 104 S.Ct. at 1067-69; United States v. Cronic, 466 U.S. 648, 657 n.20, 104 S.Ct. 2039, 2046 n.20, 80 L.Ed.2d 657 (1984). Muschott's abdication of his responsibility to investigate and present mitigating evidence was a significant error, in my view, more than sufficiently egregious to implicate Bush's right to constitutionally effective counsel. The range of professional judgment acceptable under the Sixth Amendment is wide, but not boundless.

Id. at 1096 (some emphasis supplied).

As to prejudice, the majority opinion provided no more than a two-sentence, unsupported assertion that there was no prejudice. Bush, 988 F.2d at 1093 (majority opinion). Judge Kravitch's opinion analyzed why that two-sentence holding fails under Strickland:

> The majority also errs in holding that Bush does not satisfy the prejudice prong of Strickland. Contrary to the majority's summary conclusion, a reasonable likelihood does exist that but for Muschott's constitutionally deficient performance Bush's jury would have rejected the death penalty. All that is necessary to satisfy the prejudice prong in this case is a reasonable probability that one additional juror would have voted for life. A reasonable probability is simply a likelihood sufficient to undermine confidence in the jury's death recommendation, not even proof by a preponderance of the evidence. Strickland, 466 U.S. at 693, 104 S.Ct. at 2068. Notwithstanding Muschott's constitutionally inadequate performance, the State could muster only seven votes for death. Under Florida law a six-six split constitutes a recommendation against the death penalty. ... The sentencing judge can override such a recommendation only if the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person can conclude that life imprisonment is an appropriate sentence. ... That standard could not have been met in this case.

Id. at 1096-97 (citations to cases other than Strickland omitted). Discussing the substantial nature of the evidence Muschott failed to consider, investigate or present, Judge Kravitch wrote:

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[14] The footnote stated: "In addition, the judge had ruled that Bush's inability to cross-examine the codefendants at sentencing rendered their statements about the extent of Bush's participation in the crime inadmissible. See Sentencing Hearing Tr. at 48-49."

[15] The footnote stated: "For the same reason, the fact that Bush took the stand at the sentencing phase is not determinative of the Sixth Amendment issue in this case. That Bush himself made a tactical error when he insisted on testifying does not render Muschott's independent failure to prepare for sentencing any more constitutionally palatable."

> Abundant mitigating evidence was available to humanize Bush in the eyes of the jury, including his loving devotion to his child suffering from Down's Syndrome and his borderline intellectual functioning (if not more serious mental health problems). If only some of that evidence had been introduced, the State would not have been able to emphasize to the jury, as it did, that "[t]here has been no testimony concerning the character of the defendant other than the fact that he was previously convicted of a serious crime." Sentencing Hearing Tr. at 155. Because no mitigating evidence whatsoever was introduced, the jury was left with only the prosecution's view: that John Earl Bush possessed no positive human qualities worth sparing.

Id. at 1097. And Judge Kravitch concluded: "nearly half of Bush's jurors were inclined to mercy notwithstanding Muschott's defective performance. Substantial mitigation was available if Muschott had only conducted a basic investigation. There is far more than a mere reasonable probability that John Earl Bush today faces execution because of constitutionally ineffective assistance of counsel." Bush, 988 F.2d at 1097 (Kravitch, J., dissenting).

Given the nature of Florida's sentencing scheme -- that a jury recommendation of life without a "reasonable basis" in the record such as mitigating evidence supporting it may be overridden, Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989) -- and given counsel's own testimony that there was a "consensus" and "substantial likelihood" that the death penalty "would be imposed [by the judge] regardless of the jury's recommendation" (Dist.Ct. Tr. 363) (emphasis added), counsel's failure to develop and present any mitigation cannot be deemed adequate attorney performance under this Court's law. Counsel, however, testified at the hearing that the course he followed, without adequately investigating in the first instance, was to present no mitigation to support a verdict

of life and he, in fact, developed and presented no mitigating evidence. With such a "substantial likelihood" that death would be imposed by the judge regardless of the jury's verdict, it was especially important for counsel to develop and present mitigation in order to establish a "reasonable basis" for a life recommendation. See Stevens, 552 So. 2d at 1086-87.

Counsel's failure to develop mitigating evidence here was unreasonable under any view of Strickland because it was a decision that made a sentence of death more likely, whether or not the jury recommended life; because of the facts elicited from him and the prosecutor at the hearing demonstrating that there was no true rebuttal for most of the mitigating evidence which could have been presented, see Bush, supra (Kravitch, J., dissenting);[16] and because counsel's decision was made without the benefit of a reasonable and informed investigation and development of available mitigating evidence. See Bush, 988 F.2d at 1093-97 (dissenting opinion of Judge Kravitch).

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[16] The trial prosecutor testified at the District Court hearing that he presented all the evidence he had available against Mr. Bush (E.g., Dist.Ct.Tr. 250). When asked about what evidence he and Muschott believed could have been introduced to rebut the mitigation outlined above, the prosecutor stated that there was no rebuttal evidence in his possession to undermine that testimony (Tr. 248) and that "we didn't have any evidence to rebut that" (Tr. 271-72). Muschott himself acknowledged that he did not know what theory the prosecution could have used to rebut evidence of statutory mitigating circumstances in this case (Dist.Ct.Tr. 412), and could not explain what rebuttal he believed the state could have introduced to rebut additional nonstatutory mitigation.

C. Conclusion

This case involves an attorney who knew the trial judge was inclined to impose death irrespective of the jury's decision, but who nevertheless undertook little effort to develop evidence in mitigation and then presented none. Given the evidence and the jury's 7-5 vote, any effort by counsel to present mitigating evidence could have resulted in a life recommendation from the jury. Moreover, evidence such as that involved in this case would have established a "reasonable basis" for life as a matter of Florida law, thus protecting the jury's verdict against a judicial override.

Without any presentation by counsel, however, the prosecutor was allowed to argue for death to the jury and judge because: "There has been no testimony concerning the character of the defendant other than the fact he was previously convicted of a serious crime" (ROA 1279). As Judge Kravitch explained, even taking into consideration any evidence or argument the state might conceivably have produced in rebuttal, Mr. Bush established deficient performance and prejudice under Strickland. Bush v. Singletary, supra (Kravitch, J., dissenting) (Att. A).

The standards of Strickland, as Judge Kravitch's dissent demonstrates, cannot be squared with the panel majority's decision. The Eleventh Circuit's decision here is not an isolated misapplication of Strickland. See White; Harich (discussed above). The conflicts with this Court's precedent embodied in the Bush majority opinion will continue to affect cases in the Eleventh

Circuit. The conflicts and the substantial questions involved warrant this Court's review.

If the law is to be altered to hold that any "tactic" asserted by counsel, no matter how poorly informed or how inadequate the investigation, will insulate that lawyer against a claim of ineffective assistance of counsel, Petitioner respectfully submits that it is this Court which should so hold. Even under such a standard, Petitioner's case remains a compelling one, for it is difficult to conceive of any attorney who would choose to put on nothing in mitigation (and thus to present no "reasonable basis for life") when he knows in advance that the judge is inclined to impose death regardless of the jury's decision. That is what counsel "chose" to do here. And he made that "choice" on the basis of an "investigation" that was far from adequate or reasonable. See Bush, 988 F.2d at 1093-97 (Kravitch, J., dissenting) (Att. A).

The Eleventh Circuit majority opinion is at odds with the law of Strickland. The standard embodied in that opinion will affect future cases in the Eleventh Circuit presenting claims of ineffective assistance of counsel at capital sentencing. This case warrants the granting of this petition for writ of certiorari in order for the conflicts to be resolved and in order for this Court to inform practitioners and subsequent panels of the Eleventh Circuit of the standards under which they should operate when evaluating claims of ineffective assistance of counsel at capital sentencing.

CONCLUSION

Based on the foregoing Petitioner prays that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Celia A. Terenzio, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 18th day of October, 1993.

Julie D. Naylor
Attorney